Power Company v. Reilly, 893 F.2d 901, 905 (7th Cir. 1990) ("*WEPCO*"); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 862 (S.D. Ohio 2003); *United States v. Southern Indiana Gas and Electric Co.*, 245 F. Supp. 2d 994, 998 (S.D. Ind. 2003) ("SIGECO").

In EPA's PSD enforcement action against Duke Energy, the Fourth Circuit's role is to apply the "modification" test specified in EPA's PSD regulations and determine if the company's plant renovations triggered PSD requirements. Yet, completely disregarding section 307's clear requirements, the Fourth Circuit announced that "the language and various interpretations of the PSD regulations, on which the district court partially based its holding and which the parties exhaustively discuss, are largely irrelevant to the proper analysis of this case." *United States v. Duke Energy*, 411 F.3d 539, 547 n.3 (4th Cir. 2005). Instead of interpreting and applying EPA's regulations, the Fourth Circuit focused exclusively on ascertaining what it thought the statute requires, and based on that statutory reading, announced that the PSD program must apply the same test as in the NSPS regulations for determining when a "modification" occurs. *See id.* at 550. ("Congress' decision to create identical statutory definitions of the term 'modification' has affirmatively mandated that this term be interpreted identically for the two programs."). Without making any attempt to explain how EPA's PSD regulations could be read to establish an hourly emissions rate test, the court declared that the PSD test must turn on hourly emissions because "[n]o one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's

hourly rate of emissions constitutes a 'modification.'" *Id.* at 550 (emphasis in original).

The Fourth Circuit tries to explain away the section 307 requirements by stating that "[o]ur choice of this interpretation of the PSD regulations – as required under the statute – over the EPA's interpretation is not an invalidation of those regulations." *Id.* at 549 n.7. But the Fourth Circuit did not interpret the regulations; if it did, it would have no choice but to conclude that the PSD regulations define modification in terms of whether a physical or operational change will result in an annual emissions increase, taking into account increased hours of operation enabled by the change.[3] To the contrary, the Fourth Circuit ignored the PSD regulations and substituted its own test based on its reading of the statute – something it has no jurisdiction to do. *See Adamo Wrecking v. United States*, 434 U.S. 275, 284 (1978) (The district court is not in violation of section 307 because it "did not presume to judge the wisdom of the regulation"). *See also WEPCO*, 893 F.2d at 914 n.6 ("As a preliminary matter, we note that WEPCO has not asked us to review the propriety of the NSPS regulations themselves. Indeed, we have no such jurisdiction to conduct such an inquiry: 42 U.S.C. section 7607(b)(1) reserves such questions for the [DC Circuit]. . . . WEPCO simply requests that we consider whether the EPA properly applied these regulations to the . . . generating units. We have jurisdiction to undertake such an inquiry."); *United States v. Ho*, 311 F.3d 589, 607 (5th Cir. 2002); *Puerto Rican Cement Co. v. Environmental Protection Agency*, 889 F.2d 292, 299 (1st Cir. 1989).

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[3] *See infra* pp. 14-15 for further discussion of the plain language of the PSD regulations.

Duke is well aware that a challenge to the validity of nationally applicable regulations must occur in the D.C. Circuit; indeed, a host of industry petitioners, including Duke, challenged various provisions of the 1980 regulations directly in the D.C. Circuit shortly after those regulations were promulgated. *See Chemical Manufacturers Ass'n v. Environmental Protection Agency*, Nos. 79-1112 *et al.* That case was stayed several times and was recently revived and consolidated with additional challenges to EPA's 2002 rules in *New York I*. 413 F.3d at 3. In *New York I*, after stating that the "Industry petitioners also challenge the 1980 rule's definition of modification in the NSR[4] context to the extent that it differs from the NSPS definition," the court held, "[w]e are not convinced." *Id.* at 18. The D.C. Circuit found no indication in the statute or legislative history that Congress intended to incorporate the definition of "modification" in the NSPS regulations into the PSD program. *Id.* at 19. Further, the court noted that the NSPS regulations in place as of the 1977 Act amendments "used two different (and possibly inconsistent) definitions of modification," and that "[g]iven the two quite differently worded regulatory definitions of 'modification' *within* the NSPS program at the time of the 1977 amendments, it would take a rather pointed indication from Congress to support the idea that it expressly adopted one of them for NSR. No such indication exists."[5]

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[4] NSR or New Source Review is the overarching program that includes PSD review, for areas in attainment with the National Ambient Air Quality Standards ("NAAQS"), and Nonattainment New Source Review, for areas that are not in attainment with the NAAQS. This case concerns only PSD as the areas where Duke's plants are located are in attainment for the NAAQS.

[5] In *New York I*, the D.C. Circuit rejected industry's congressional incorporation argument – that when Congress amended the Clean Air

(Continued on following page)

Id. at 19-20 (emphasis in original). In sum, just as directed by section 307, Duke challenged the validity of EPA's PSD regulations in the D.C. Circuit. After failing in that challenge, Duke cannot have a second bite at the apple in this case.

B. Uniform Judicial Review of Nationally Applicable Regulations Is Critical to EPA's Ability to Properly Carry Out the Directives of the Clean Air Act.

This case provides a prime example for why assurance that "the substantive provisions of . . . [regulations are] uniformly applied and interpreted and that the circumstances of . . . adoption [should] be quickly reviewed by a single court" is of critical importance to EPA's ability to implement the Act. *Adamo Wrecking*, 434 U.S. at 284; *United States v. Ethyl Corp.*, 761 F.2d 1153, 1156 n.7, 1157 (5th Cir. 1985). Following the enactment of the Clean Air Act in 1970, EPA was tasked with establishing National Ambient Air Quality Standards ("NAAQS"), by "identify[ing] the maximum airborne concentration of a pollutant that the public health can tolerate, decreas[ing] the concentration to provide an 'adequate' margin of safety, and set[ting] the standard at that level." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 465 (2001). The

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Act in 1977 and added the PSD program Congress intended to incorporate the existing NSPS regulations into the PSD program. 413 F.3d at 20. As to the slightly different argument Duke attempts to make here, the court stated "[w]e express no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs. That argument was not made by industry petitioners in their opening brief and is therefore waived." *Id.* (internal citations omitted).

PSD program is crucial to the Act because it "[s]eek[s] to prevent backsliding in regions whose air quality [meets the] NAAQS [by requiring] sources undertaking modifications to obtain preconstruction permits." *New York I*, 413 F.3d at 12. Without uniform, national regulations for the PSD program, EPA's ability to approve state implementation plans ("SIPs"), to write permits and to bring appropriate enforcement actions will be significantly disrupted.

First, the stability and effectiveness of SIPs – which lie at the core of delegated state enforcement actions – would be undermined if the Fourth Circuit's decision is allowed to stand. The Act requires EPA to approve SIPs, designed by and for each individual state, provided that the SIPs "include a program to provide for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that the national ambient air quality standards are achieved, including a permit program." 42 U.S.C. § 7410(a)(2)(C). If the lower courts can invalidate the PSD regulations at any time, thereby potentially forcing EPA to redraft the regulations time and again, EPA (and the states[6]) could never be certain that the SIPs will actually contain the appropriate requirements to limit emissions and achieve the NAAQS. The states would, in essence, be required to revisit and revise the SIPs every time the regulations were invalidated and rewritten. 40 C.F.R. §§ 51.166(a)(3), (4). Since development and adoption of the regulations is an incredibly costly and time consuming endeavor, the SIPs would likely be left in limbo for lengthy

[6] *See* State of New Jersey's *amicus* brief for further discussion of the importance of uniform PSD regulations in conjunction with the states' ability to formulate adequate SIPs.

periods of time.[7] Section 307 was added to the Act precisely to prevent such an inefficient scenario. *See Adamo Wrecking*, 434 U.S. at 284. *See also Lubrizol Corp.*, 547 F.2d at 315, 317.

In addition, without uniform and final PSD regulations, the preconstruction permits will be written under a veil of uncertainty for both EPA and industry. The PSD program was established "to assure that any decision to permit increased air pollution in any area . . . is made only after careful evaluation of all the consequences of such a decision." 42 U.S.C. § 7470(5). To carry out this goal, the Act provides that "[n]o major emitting facility . . . may be constructed [or modified] in an area [that has attained the NAAQS] unless . . . the required analysis has been conducted in accordance with regulations promulgated by the Administrator." 42 U.S.C. §§ 7475(a)(2), 7479(2)(c). Such regulations must "assur[e] that maximum allowable increases . . . [of pollutants] shall not be exceeded." 42 U.S.C. § 7473(a). EPA and the states, when issuing permits, bear the responsibility of ensuring that modifications to existing sources do not "cause, or contribute to, air pollution in excess of" these thresholds. 42 U.S.C. § 7475(a)(3).

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[7] For example, when the 1978 PSD regulations were successfully challenged in *Alabama Power* under section 307 in the D.C. Circuit, it took EPA two years (until August, 1980) to issue amended regulations. *See Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980). *See also* 43 Fed. Reg. 26,380 (June 19, 1978); 45 Fed. Reg. 52,676 (Aug. 7, 1980). When EPA's 1997 rules for ozone NAAQS were successfully challenged under section 307 in the D.C. Circuit (and then appealed to this Court), it took EPA seven years (until April, 2004) to issue amended regulations. *See American Trucking Ass'ns*, 531 U.S. 457. *See also* 62 Fed. Reg. 38,856 (July 18, 1997); 69 Fed. Reg. 23,951 (April 30, 2004).

The potential for changing regulations would create competitive disparity across industry if some facilities are permitted under old regulations, while others are permitted under new regulations.[8] EPA should not be tasked with the prospect of redrafting industry permits throughout the life of the regulations in response to industry challenges to the regulations. Such a scenario will provide incentive for regulated entities to challenge regulations any time they are unhappy with their permit or are targeted in an enforcement action. Although EPA is certainly able to revisit regulations on its own, due to changed circumstance or otherwise, any revisions to the regulations would be subject to notice and comment rulemaking, not the unilateral decision of a lower court judge.

Finally, the Clean Air Act's enforcement scheme would break down in the face of an affirmation of the Fourth Circuit's decision. "The process [for completing a new source review case] can take years due to: the size of utilities; the amount and complexity of historical information involved; the type of utility expertise needed to effectively develop an NSR case; and the limited EPA, State, and local agency enforcement resources." *New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-fired Electric Utilities*, Office of Inspector General, Report No. 2004-P-00034, Sept. 30, 2004, pp. 22-23 (*available at* http://www.epa.gov/oig/reports/2004/20040930-2004-P-00034.pdf). *See also Air Pollution: EPA Should Improve Oversight of Emissions Reporting at Large*

[8] EPA believes that the Fourth Circuit's "holding creates a potential disparity in the way we interpret the program in States in the Fourth Circuit compared to States in other Circuits in the country." 70 Fed. Reg. 61,081, 61,083 (Oct. 20, 2005).

Facilities, Government Accounting Office, April 2001, pp. 10-11 (*available at* http://www.gao.gov/new.items/d0146.pdf). EPA will usually begin by submitting a section 114 request for documents to the regulated entity and can spend years reviewing these documents before attempting settlement, filing its own administrative complaint or referring the case to the Department of Justice for enforcement. *See id. See also* 42 U.S.C. § 7413(a)(1); 42 U.S.C. § 7414. Discovery in this case alone "produced approximately 4.6 million pages of documents . . . [and] lengthy briefs [were] accompanied by thousands of pages of exhibits." *United States v. Duke Energy*, 278 F. Supp. 2d 619, 622 (M.D.N.C. 2003). If EPA has to change course in the middle of building an enforcement case in response to the invalidation of its own regulations, enforcement actions will become overwhelmingly inefficient, and in some circumstances enforcement will simply fall away. Such a scenario is not what Congress envisioned when the Clean Air Act was enacted.

II. EVEN IF THE FOURTH CIRCUIT HAD JURISDICTION, ITS REGULATORY INTERPRETATION DISREGARDS THE PLAIN LANGUAGE OF THE PSD REGULATIONS AND VIOLATES THE ACT.

Industry's hourly emissions test for triggering PSD requirements is contrary to the purposes of the Act, EPA's consistent PSD regulations, and related case law. The plain language of the PSD regulations clearly provide for an actual annual emissions test taking into account increased hours of operation enabled by a change at a facility. In addition, only an annual emissions test will fulfill the purposes of the PSD program to prevent backsliding in regions where the air quality is adequate. And

the fact that industry, including Duke, and EPA entered into a settlement agreement that required EPA to propose an hourly test after the applicable 1980 PSD regulations were finalized provides further proof that an hourly test does not apply to this case. Since an hourly test does not capture total actual annual emissions increases from a source, such a test simply cannot be sanctioned.

A. Industry's Hourly Test Is Contrary to the Plain Language of EPA's PSD Regulations.

Contrary to the Fourth Circuit's decision, EPA's PSD regulations unmistakably require an annual test, not an hourly test, for calculating an emissions increase that will trigger the PSD permitting requirements. The Act requires the owner or operator of a major stationary source to obtain a permit before undertaking a "modification," which the Act defines as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). The regulations clarify that PSD requirements are triggered only for "major" modifications. 40 C.F.R. § 51.166(i)(2). A major modification occurs where a "physical change . . . would result in a significant net emissions increase." 40 C.F.R. § 51.166(b)(2)(i). A significant net emissions increase can be broken into a four-part test:

> 1. Emissions increase: "[a]ny increase in *actual emissions* from a particular physical change or change in the method of operation at a stationary source." 40 C.F.R. § 51.166(b)(3)(i)(a) (emphasis added).

2. Actual emissions: "the actual rate of emissions of a pollutant from an emissions unit . . . In general, actual emissions as of a particular date shall equal the average rate, in *tons per year*, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. . . . Actual emissions shall be calculated using the unit's *actual operating hours*, production rates, and types of materials processed, stored, or combusted during the select time period." 40 C.F.R. § 51.166(b)(21)(i), (ii) (emphasis added).

3. Netting: combine step two with: "[a]ny other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable." 40 C.F.R. § 51.166(b)(3)(i)(b).

4. Significant: The net emissions increase must exceed pollutant specific annual emissions thresholds expressed in tons per year. For example, the net emissions increase for sulfur dioxide must exceed 40 tons per year to trigger the PSD requirements. 40 C.F.R. § 51.166(b)(23)(i).

The lower courts' interpretation of this regulatory language as warranting an hourly emissions test is completely unfounded. The words "hourly emissions" exist nowhere in the text of the regulations. Thus, it is unsurprising that the Fourth Circuit's decision omits any explanation for how the regulations could be read to establish an hourly test. In light of the plain regulatory language establishing an actual annual emissions test for determining PSD applicability, the Fourth Circuit's conclusion that EPA must apply an hourly test should be rejected.

B. The EPA Regulations and Related Case Law Regarding PSD Confirm that Duke Was Required to Consider Increased Emissions Caused by Increased Hours of Operation When Evaluating Whether PSD Requirements Applied to its Plant Renovations.

The "net emissions increase" step of the "major modification" test clearly requires a comparison of the pre- and post-project annual emissions, including "actual operating hours." 40 C.F.R. § 51.166(b)(21)(ii). The lower courts' determination that the pre-project hours of operation must remain constant in calculating the emissions increase is simply incorrect. *See Duke Energy*, 411 F.3d at 545, *Duke Energy*, 278 F. Supp. 2d at 640. The so-called "hours of operation exclusion," which states that "[a] physical change . . . shall not include . . . [a]n increase in hours of operation," does not apply to this case. *See* 40 C.F.R. § 51.166(b)(2)(iii)(f). Rather, this exclusion simply clarifies that a facility that is not operating at capacity may increase its hours of operation "to take advantage of favorable market conditions," 45 Fed. Reg. 52,676, 52,704 (Aug. 7, 1980), without triggering PSD requirements, as long as this increase is achieved without an associated "physical change in or change in the method of operation of," 40 C.F.R. § 51.166(b)(2)(i), the source. In other words, an increase in hours of operation, on its own, does not constitute an NSR-triggering physical or operational change. The exclusion does not apply to the present case because the increase in hours of operation occurred as a result of the physical changes that Duke made to its facilities.

EPA and the courts have consistently interpreted the exclusion in this manner. EPA confirmed the narrow application of the hours of operation exclusion when it

issued the applicability determination for the proposed modifications at the WEPCO plants. WEPCO argued that since "any emissions increases would be due to increased production rates or hours of operation rather than higher emissions per unit of production. . . . these increases should be excluded from consideration in determining whether a net significant emissions increase and, hence, a major modification, would occur." *Applicability of Prevention of Significant Deterioration Requirements (PSD) and New Source Performance Standards (NSPS) Requirements to the Wisconsin Electric Power Company (WEPCO) Port Washington Life Extension Project*, Memorandum From: Don R. Clay, Acting Asst. Admin. For Air and Radiation, To: David A. Kee, Director, Air and Radiation Division, Region V, Sept. 9, 1988, p. 8 (Joint Appendix "JA" 257-58). EPA responded to WEPCO's argument by stating that:

> The WEPCO is incorrect in this regard. . . . the exclusions cited by WEPCO are intended to apply where a source increases emissions by simply combusting a larger amount of fuel, or processing a larger amount of raw materials during a given time period, or by expanding its hours of operation 'to take advantage of favorable market conditions' (see 45 FR 52704) . . . *it is obvious that WEPCO's plans to increase production rate or hours of operation are inextricably intertwined with the physical changes planned* under the life extension project. . . . [A]ccepting WEPCO's interpretation of the major modification regulations would serve to exclude from consideration all physical or operational changes except those which cause increased emissions per unit of production. Clearly, EPA never intended this result. It would allow, through substantial capital investment, significant expansion of the pollution-emitting

> capacity and longevity of major industrial facilities without PSD review of the impacts on air quality.

Id. (emphasis added).

In a follow up letter to the Vice President of WEPCO, EPA staff again confirmed the narrow application of the exclusion by stating that "an increase in any one of these three factors [emission rate, production rate or capacity utilization, and hours of operation], if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes . . . EPA explicitly assumed that emissions increases . . . would come . . . from increases in production rate or hours of operation. . . . The hourly capacity demonstration for NSPS purposes is not relevant to the PSD analysis." Letter From: Don R. Clay, Acting Asst. Admin. For Air and Radiation, To: John W. Boston, Vice President of WEPCO, February 15, 1989, pp. 9-10 (JA 294-95). EPA's applicability determination in regard to the hours of operation exclusion was ultimately confirmed by the Seventh Circuit where the court decided, *inter alia*, that "[d]espite WEPCO's protestations, we note initially that the EPA's refusal to apply the 'production rate/hours of operation exclusion' was proper. This exclusion . . . was provided to allow facilities to take advantage of fluctuating market conditions, *not* construction or modification activity." *WEPCO*, 893 F.2d at 916 n.11 (internal citations omitted) (emphasis added). *See also Puerto Rican Cement*, 889 F.2d at 298.

This application of the exclusion was again memorialized in the preambles to EPA's 1992 and 2002 rules: "Although a source may vary its hours of operation or production as part of its everyday operations, an increase in emissions attributable to an increase in hours of operation or

production rate which is the result of a construction-related activity is not excluded from review." 57 Fed. Reg. 32,314, 32,328 (July 21, 1992). "[A]n increase in utilization should not trigger the major NSR requirements unless it is related to a physical or operational change. . . . [T]he CAA only applies the major NSR requirements to emissions increases that are the result of a physical or operational change. Thus, we do not believe that the major NSR requirements should apply to a utilization increase unless the increase is related to the modification." 67 Fed. Reg. 80,186, 80,203 (Dec. 31, 2002).

Failing to cite a single EPA regulation or judicial decision in support of its broad-based interpretation of the hours of operation exclusion, Duke relies solely on an internal EPA memorandum and a letter written by a single EPA staff member in the early 1980s. *See* Memorandum From: Edward E. Reich, Director Division of Stationary Source Enforcement, To: Charles Whitmore, Chief, Technical Analysis Section, Region VII, Jan. 22, 1981 (JA 35-37). *See also* Letter From: Edward E. Reich, To: Amasjit S. Gill, General Electric, June 24, 1981 (JA 27-28). Given that the consistent EPA documents (discussed above) were written both before and after the conflicting memorandum and letter, as the court in *Puerto Rican Cement* similarly held, "these materials do not show a significant, legally recognizable 'conflict' within the agency." 889 F.2d at 299. The Fourth Circuit cannot simply retract the plain language of the regulations and EPA's and the courts' historically consistent, narrow application of the exclusion based on one EPA staff member's misstep. *See id. See also Ohio Edison Co.*, 276 F. Supp. 2d at 876-77 (rejecting reliance on Reich letters for same proposition). Indeed, because "[t]he purpose of the 'consistency' doctrine

in administrative law is . . . to prevent the agency . . . from significantly changing those policies without conscious awareness of, and consideration of the need for, change," such a deviation in the application of the regulations would require EPA to undergo notice and comment rulemaking.[9] *Id.* The lower courts' reliance on these documents for applying the hours of operation exclusion to the present facts, and the resulting hourly emissions test, is therefore improper.

Since EPA and the courts have repeatedly and consistently described the appropriate application of the hours of operation exclusion, this narrow application should come as no surprise to Duke. As the Southern District of Indiana court explained in a similar PSD enforcement case,

> Congress sweepingly defined modification . . . [for PSD purposes], and the goal of the CAA was 'to speed up and intensify' the war against pollution. Moreover, the D.C. Circuit rejected the EPA's earlier attempts to make broad, categorical exclusions from the CAA's definition of modification. *See Ala. Power v. Costle*, 204 U.S. App. D.C. 51, 636 F.2d 323 (D.C.Cir.1979) [ ]. With this regulatory context in mind, a context that a sophisticated entity like SIGECO [or in this case Duke] was surely aware of, it would be inconsistent for the EPA to broadly define a regulatory exemption [for PSD].

SIGECO, 245 F. Supp. 2d at 1014.

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[9] In fact, EPA is currently taking comments on a proposed rule for an hourly emissions test for PSD. 70 Fed. Reg. 61,081 (Oct. 20, 2005). *See infra*, pp. 26-27. Therefore, EPA recognized that notice and comment rulemaking was necessary if such a departure is going to occur.

In sum, there is no merit to the Fourth Circuit's conclusion that EPA's PSD regulations authorize sources to exclude emissions resulting from increased hours of operation made possible by a physical change when assessing whether that change triggers PSD review. Here, Duke's massive renovations plainly enabled its plants to increase their hours of operation, dramatically increasing the actual amount of pollution they release into the air each year. By discounting those emission increases and proceeding without PSD review, Duke violated the Act.

C. An Hourly Emissions Rate Test for PSD Would Undermine the Purposes of the Act's PSD Provisions.

The NSPS and PSD programs were added to the Act at different times and serve different purposes. In 1970, Congress included the NSPS program in the Act and EPA was then required to promulgate technology-based emission limits for categories of sources without regard to site-specific factors. 42 U.S.C. § 7411(a)(1). In 1977, when the Act was amended, Congress added the PSD program to, *inter alia*, prevent the quality of the air from deteriorating in areas that are in attainment with the NAAQS. 42 U.S.C. § 7470. The NSPS program is based solely on the particular type of equipment or facility emitting the pollutants, whereas the PSD program establishes control requirements on a case-by-case basis taking into account site-specific factors such as the specific environmental impact a new or modified source will have upon the area where it will be located. *See* 57 Fed. Reg. 32,314, 32,315-316 (July 21, 1992). *See also Northern Plains Resource Council*, 645 F.2d at 1356. EPA reinforced these differences by promulgating different tests for triggering PSD and

NSPS requirements: "In contrast [to the NSPS hourly emissions rate test and] in light of the air quality planning component of the NSR program, the NSR regulations examine total actual annual emissions to the atmosphere. Consequently, normal operations over a period of time is considered for purposes of determining a source's impact on ambient air." 57 Fed. Reg. at 32,331. Only an annual emissions test will fulfill the purpose of the PSD program to prevent backsliding in regions where the air quality is adequate.

To prevent facilities from significantly deteriorating the air quality, PSD statutory and regulatory provisions, in conjunction with the SIPs, establish and assure compliance with "increments" or "maximum allowable increases" of pollutants. 42 U.S.C. § 7475(a), (d), 7473(a), (b); 40 C.F.R. § 51.166(c). An owner or operator of a facility seeking to make modifications must demonstrate that "emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of" these increments. 42 U.S.C. § 7475(a)(3). The PSD permitting process is the mechanism under which EPA examines appropriate consumption of these increments. 42 U.S.C. § 7475(a)(2). Since an hourly test does not capture the total actual emissions increases resulting from a change, EPA will not be able to accurately quantify adverse impacts on air quality when doling out preconstruction permits in PSD areas. The preamble to EPA's 1980 regulations supports this analysis:

> Source applicants . . . must . . . perform an analysis to compute how much of the PSD increment remains available to them. In general the amount of increment that is available depends on certain changes in actual emissions. . . . Accordingly, cleanup adds to the available growth margin while

> new emissions diminish it. . . . Once the question of how much increment remains is resolved, then the applicant must demonstrate that his proposed new emissions would not exceed the remaining PSD increment. Where a proposed project would cause a new violation of the increment or contribute to an existing violation, it cannot be approved. Existing violations must be entirely corrected before PSD sources which affect the area can be approved.

45 Fed. Reg. 52,676, 52,678 (Aug. 7, 1980).

Recognizing that not all emissions increases should trigger the PSD requirements, EPA established "*significant* net emissions increase" thresholds calculated in "tons per year."[10] 40 C.F.R. § 51.166(b)(23)(i) (emphasis added). Before establishing these thresholds, EPA analyzed the "cumulative effect on increment consumption of multiple sources in an area each making the maximum *de minimis* emissions increase (thereby going unreviewed under PSD at the time of the change)." 45 Fed. Reg. 52,676, 52,707 (Aug. 7, 1980). EPA understood that if too many unaccounted for insignificant modifications occurred, EPA would not be able to enforce the emission increments through the PSD permitting requirements. Yet, this is exactly what will happen if the Fourth Circuit's hourly test is sanctioned. Projects that do not increase hourly emissions but do significantly increase hours of operation, and, in turn, annual emissions, would escape PSD review. Unless EPA is able to consider actual annual emissions increases, including emissions resulting from increases in

[10] These significance thresholds are the fourth step in the "major modification" definition. *See supra* p. 15.

hours of operation, the emissions inventory will be severely disrupted, and the PSD program will not function properly.

D. Industry, Including Duke, Was Well Aware that the Test for PSD Was Annual Emissions, Not Hourly Emissions.

Following industry's initial challenge to the 1980 PSD regulations, a settlement agreement ensued, whereby EPA agreed to propose a regulatory amendment that would allow sources to "calculate emissions . . . based on either the actual emissions methodology in the existing rules or the unit's potential emissions, measured in terms of hourly emissions." 61 Fed. Reg. 38,250, 38,268 (July 23, 1996) (discussing and proposing language from 1982 Settlement Agreement). In other words, by entering into this settlement agreement, EPA and industry effectively agreed that the 1980 rules already included projects that increase actual annual emissions but do not increase potential hourly emissions and that EPA would propose and take public comment on an amendment to exclude such projects. If industry believed that such projects were already excluded from the 1980 PSD regulations, as they allege in this case, then there would be no incentive for industry, including Duke, to settle in 1982 based on EPA's agreement to propose their desired test for public comment.

In 1996, EPA proposed for public comment the language agreed to in the 1982 Settlement Agreement: "sources may calculate emissions increases and decreases . . . measured in terms of hourly emissions (i.e., pounds of pollutant per hour)." 61 Fed. Reg. at 38,268. EPA noted that "[t]he primary effect of an hourly potential test is to eliminate a source's level of operations as a factor when

determining whether a proposed change will result in an increase. Past and future level of utilization of the source are completely disregarded." *Id.* at 38,269. After a preliminary analysis of the proposed rule, EPA concluded that:

> [T]here is concern for the environmental consequences. For example, assume the emissions unit at the widget factory that is emitting 10 pounds an hour but has historically operated at 40 percent capacity due at first to operating cost, but with age, reduced efficiency and reliability. Under the [hourly potential test], the owner could modernize the unit . . . [and] allow the owner to use the machine at much higher levels (e.g., more hours per day or week) than it had in the past. As a result actual emissions (measured in tpy [tons per year]) could more than double due to the increase in utilization even though hourly potential emissions remain the same. . . . [O]ne of the most troubling side effects of the . . . proposal is that it could ultimately stymie major new source growth by allowing unreviewed increases of emissions from modifications of existing sources to consume all available increment in PSD areas. . . . [U]nder the . . . [proposal] an old grandfathered source could experience a 'significant' net increase in annual actual emissions, yet it would not necessarily be subject to review.

Id. at 38,269, 38,270.

In 2002, after receiving comments on the hourly emissions test for triggering PSD review, EPA rejected the test. 67 Fed. Reg. 80,186, 80,205 (Dec. 31, 2002). EPA reasoned that an hourly test

> could sanction greater actual emissions increases to the environment . . . without any preconstruction review. In addition, actual emissions increases resulting from unreviewed projects could go largely undocumented until a PSD review is performed by a new or modified facility that ultimately must undergo review. By that time, however, a violation of an increment could have unknowingly occurred. . . . We agree that . . . [the proposed hourly test] could lead to unreviewed increases in emissions that would be detrimental to air quality and could make it difficult to implement the statutory requirements for state-of-the-art controls.

Id.

Although EPA's latest proposed PSD regulations depart from the lengthy historic consistency described above, it only further illustrates that the regulations applicable in this case provide for an actual annual emissions test. In October, 2005, EPA requested public comment on amendments to the PSD program that would allow existing power plants, such as Duke's, "to use the same maximum achievable hourly emissions test we apply under NSPS to determine whether a physical change in or change in the method of operation . . . results in an emissions increase." 70 Fed. Reg. 61,081, 61,088 (Oct. 20, 2005). Indeed, EPA states in the 2005 proposed rule that "EPA entered into a Settlement Agreement which required us to propose an NSPS-like, hourly-potential-to-hourly-potential emissions increase test for modification," and that the current PSD rules require "a source [to] look[] at whether a project will result in a significant emissions increase on an annual basis." *Id.* EPA asks for comment on this proposed rule a minimum of 25 times in the 22-page document; EPA recognizes that the proposed rule is a

stark departure from the previous long-standing actual annual emissions test.[11]

EPA's use of an actual annual emissions test, rather than an hourly potential test, should come as absolutely no surprise to Duke. EPA was quite capable of writing an hourly emissions test if it so desired, as it plainly did for the NSPS program 30 years ago and as it has only now proposed for the PSD program. If industry and EPA believed that an hourly rather than annual test already existed, the 1982 settlement, the resulting 1996 proposal, the 2002 rejection of that proposal, and the subsequent 2005 proposal would not be necessary.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals should be reversed in its entirety.

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Respectfully submitted,

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[11] The 2005 proposal clearly states that "[t]he proposed rule would only apply prospectively." 70 Fed. Reg. at 61,081 (Oct. 20, 2005).